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## **SUMMARY OF INITIAL AND CONTINUING DISCLOSURE ISSUES**

### **INITIAL OFFERING DISCLOSURE**

#### **I. SECURITIES AND EXCHANGE COMMISSION**

Federal securities laws provide the basis for the preparation of disclosure documents in the context of a municipal securities offering. Although bonds issued by state and local governmental entities are generally exempt from the registration requirements of the Securities Act of 1933, the “anti-fraud” provisions of that law and the Securities Exchange Act of 1934 do apply. Although the U.S. Securities and Exchange Commission (the “SEC”) is statutorily barred from regulating the municipal securities markets, it does regulate broker-dealers, i.e., underwriters, and certain requirements imposed upon underwriters directly affect and impose obligations upon issuers. Finally, the SEC communicates its views as to disclosure matters to the bond community through various releases and enforcement proceedings.

##### **A. *Securities Act of 1933***

Section 17 (a) It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mail, directly or indirectly

1. to employ any device, scheme or artifice to defraud, or
2. to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, or
3. to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

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*B. Securities and Exchange Act of 1934*

1. Section 10. It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange.  
  
(b) to use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.
2. Regulation, 240.10b-5 ("Rule 10b-5"). It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,
  - (a) to employ any device, scheme, or artifice to defraud,
  - (b) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
  - (c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

II. DISCLOSURE DOCUMENT

Historically the Official Statement was prepared by counsel to the underwriter. While the issuer provided input, the document was viewed as largely the underwriter's responsibility. SEC pronouncements have made it clear that the Official Statement is viewed as the issuer's document and regardless of who prepares it, the issuer must accept responsibility for its content. This emphasis on the issuer's responsibility has lead many issuers to engage disclosure counsel to prepare the Official Statement (and/or render an opinion with respect to the document).

- A. Structure and Content of the Official Statement.* Generally, the following topics are addressed in an Official Statement for a lease financing:
1. Introduction;
  2. Description of the bonds;

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3. Security and Sources of Payment for the Bonds; including subsections describing budgeting for base rental payments, reserve fund, abatement, proceeds of insurance or condemnation awards and remedies upon default;
  4. Redemption provisions;
  5. Debt service schedule;
  6. Estimated sources and uses of funds;
  7. Description of the project;
  8. Description of the issuer
  9. Risk factors;
  10. Concluding sections, including Tax Matters, Ratings, Certain Legal Matters, Continuing Disclosure and Underwriting
  11. An Appendix setting forth financial, economic and demographic information concerning the issuer; and
  12. An Appendix setting forth the most recent audited financial statements of the issuer.
- B. *General and Demographic Data.* The following are topics often addressed in an appendix to the Official Statement, providing financial, economic and demographic information concerning the Issuer:
1. General description of the Issuer;
  2. Form of governance;
  3. Population;
  4. Labor relations;
  5. Industry and employment;
  6. Commercial activity;
  7. Construction activity;
  8. Principal taxpayers;
  9. Investment policy; and

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10. Direct and overlapping debt.

*C. Preliminary Official Statement*

1. The Preliminary Official Statement is the document circulated to prospective purchasers of a particular issue of municipal bonds. It contains substantively all of the same information concerning the financing and the credit aspects of a bond issue as does the Official Statement. Of course, since it is circulated prior to sale of the bonds, market-driven information, such as exact amount of bonds, interest rate, optional redemption premiums and the like are generally omitted.
2. Underwriters are required pursuant to SEC Rule 15c2-12 to, prior to purchasing offering or selling bonds, review an official statement which the issuer “deems final” except for the omission of certain pricing information such as that described above. Hence, underwriter’s counsel typically requires that the issuer execute a certificate which confirms that the issuer deems the Preliminary Official Statement “final” for this purpose.

*D. Official Statement*

1. An Official Statement is designed to satisfy the anti-fraud provisions of federal securities laws. SEC Rule 10b-5 sets forth the relevant legal standard.
2. Who prepares the Official Statement?

III. SOURCES OF GUIDANCE

*A. SEC Releases, Other Announcements and Enforcement Actions.* See [www.sec.gov](http://www.sec.gov).

*B. Industry Publications.*

1. Disclosure Guidelines for State and Local Government Securities (“GFOA Guidelines”).
2. National Federation of Municipal Analysts.
3. Disclosure Handbook for Municipal Securities. Sector by Sector approach. First published by the National Federation of Municipal Analysts in 1990 and updated in 1992. To obtain copies, please contact:

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- National Federation of Municipal Analysts  
Lisa Good, Executive Director  
P.O. Box 14893  
Pittsburgh, PA 15234  
Phone: 412-341-4898  
Fax: 412-341-4894  
Email: [lgoodnfma@adelphia.net](mailto:lgoodnfma@adelphia.net)
4. Others.
  5. SEC Releases, which can be found at [www.sec.gov](http://www.sec.gov)
  6. Other Announcements
  7. SEC Enforcement Actions

**CONTINUING DISCLOSURE**

**I. OVERVIEW OF SECURITIES AND EXCHANGE COMMISSION RULE 15c2-12**

- A. *Purpose.* The purpose of the amendments to Rule 15c2-12 was to ensure that brokers, dealers and municipal securities dealers would review secondary market disclosure practices of issuers and other “obligated persons” at the time of an offering of municipal securities. This would enable investors to better protect themselves from misrepresentation and fraudulent activities by brokers, dealers and municipal securities dealers.
- B. *Application and Requirements.* Rule 15c2-12 prohibits participating underwriters from acting as underwriters of municipal securities, in a principal amount of \$1,000,000 or more, *unless* an exemption applies if such underwriters have reasonably determined that the Issuer of the municipal securities or an Obligated Person has undertaken to provide the marketplace certain ongoing information.
  1. References to continuing disclosure are included in the Preliminary and Final Official Statements, the trust indenture and bond resolution or ordinance, the bond purchase agreement, underwriting agreement or notice of sale, the disclosure agreement and the annual report or events notice.
  2. Continuing Disclosure Agreement. This Agreement is entered into by and among the Issuer, the Obligated Persons and the indenture trustee or other designated agent for the benefit of the holders of the municipal securities, or it is an undertaking by the Issuer.

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3. Financial and Operating Data. Annual financial information must be submitted to each Nationally Recognized Municipal Securities Information Repositories (“NRMSIRs”) and the State Information Depository (“SID”) for each Obligated Person for whom financial information or operating data is presented in the Final Official Statement.
  - (a) Issuer.
  - (b) Obligated Persons – Any person, including the Issuer, who is either generally or through an enterprise, fund, or account of such person committed by contract or other arrangement to support payment of all, or part of the obligations on the municipal securities to be sold. The definition of Obligated Persons *does not* include providers of municipal bond insurance, letters of credit or other liquidity facilities.
4. Events Notices.
  - (a) Principal and interest payment delinquencies.
  - (b) Non-payment related defaults.
  - (c) Unscheduled draws on debt service reserves reflecting financial difficulties.
  - (d) Unscheduled draws on credit enhancements reflecting financial difficulties.
  - (e) Substitution of credit or liquidity providers, or their failure to perform.
  - (f) Adverse tax opinions or events affecting the tax exempt status of the securities.
  - (g) Modifications to rights of any security holder.
  - (h) Bond calls.
  - (i) Defeasances.
  - (j) Release, substitution or sale of property securing repayment of the securities.
  - (k) Rating changes.

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5. Information Repositories. The required information must be disseminated to each NRMSIR and the SID, if any.
- (a) State Information Depository. The State of California does not currently have a SID.
- (b) Nationally Recognized Municipal Information Securities Information Repositories. A list of the current SEC approved NRMSIRs is available at: [www.sec.gov/info/municipal/nrmsir.htm](http://www.sec.gov/info/municipal/nrmsir.htm). The current NRMSIRs are:

Bloomberg Municipal Repositories  
100 Business Park Drive  
Skillman, New Jersey 08558  
Phone: (609) 279-3225  
Fax: (609) 279-5962  
E-mail: [MUNIS@bloomberg.doc](mailto:MUNIS@bloomberg.doc)

DPC Data Inc.  
One Executive Drive  
Fort Lee, New Jersey 07024  
Phone: (201) 346-0701  
Fax: (201) 947-0107  
E-mail: [nrmsir@dpcdata.com](mailto:nrmsir@dpcdata.com)

FT Interactive Data  
Attn: NRMSIR  
100 William Street  
New York, New York 10038  
Internet address: [NRMSIR@DFTID.com](mailto:NRMSIR@DFTID.com)  
Phone: (212) 771-6999  
Fax: (212) 771-7390 (Secondary Market Information)  
(212) 771-7391 (Primary Market Information)

Standard & Poor's J.J. Kenny Repository  
55 Water Street 45<sup>th</sup> Floor  
New York, New York 10041  
Phone: (212) 438-4595  
Fax: (212) 438-3975  
Internet address: [nrmsir\\_repository@sandp.com](mailto:nrmsir_repository@sandp.com)

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II. ELECTRONIC DISSEMINATION OF INFORMATION

A. *Application of Securities law to Issuer Websites*

1. Rule 10b-5 – Municipal issuers must ensure that their public disclosure complies with their obligations under both Rule 15c2-12 and Rule 10b-5
2. Rule 15c2-12

- (a) In 1994 the SEC issued an interpretive release in which its view with respect to how the federal antifraud provisions apply to disclosure made pursuant to Rule 15c2-12 is expressed. The SEC's view was summarized as follows:

A municipal issuer may not be subject to the mandated continuous reporting requirements of the Exchange Act, but when it releases information to the public that is reasonably expected to reach investors and the trading markets, those disclosures are subject to the antifraud provisions. The fact that they are not published for purposes of informing the securities markets does not alter the mandate that they not violate antifraud proscriptions. Those statements are a principal source of significant, current information about the issuer of the security, and thus reasonably can be expected to reach investors and the trading market.

Thus, when an issuer discloses information that will reach investors it must be accurate and complete in order to comply with the antifraud provisions.

- (b) In 2000, the SEC issued a interpretive release (the “**2000 Release**”) which provides guidance on the use of electronic media by issuers. The 2000 Release reiterates that the federal securities laws apply in the same manner to the content of an issuer's web site as to any other statements made by or attributable to the issuer. Issuers will be held responsible for the accuracy of their statements that can reasonably be expected to reach investors in the securities markets regardless of the medium.



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*B. Segregation of Investor Information*

1. Information available on an Issuer's web can reasonably be expected to reach investors. This is true regardless of whether the information posted on the web site is intended to reach investors.
2. First, an issuer can be held liable under Rule 10b-5 for third-party information to which the issuer has hyperlinked from the issuer's web site if:
  - (a) the issuer has involved itself in the preparation of the information or
  - (b) explicitly or implicitly endorsed or approved the information.
3. Second, documents delivered together with disclosure information are considered to be part of the disclosure. In the case of a web site, it is possible that all information on the web site could be considered disclosure information and the issuer could be held liable for the accuracy and completeness of all information in the web site under Rule 10b-5.

*C. Disclaimer for Disclosure Information*

1. A disclaimer is helpful for compliance with federal securities laws because it permits the issuer to provide information to the investor and at the same time seek to limit the scope of the issuer's responsibilities for the accuracy and completeness of the information provided.
2. For example, disclaimers can clarify that certain information speaks only as of its date and will not be updated, that offering documents do not constitute an offer to sell or a solicitation of an offer to buy securities, that information posted is subject to change, that certain information is for general informational purposes only and is not "full and fair disclosure", that there are estimates or projections contained in the information and that actual results may differ materially and so on.

*D. Internal Control of Disclosure Information*

1. To ensure compliance with the federal securities laws, an issuer must ensure that all disclosure is accurate and complete. Accuracy implies that contradictory information will not be disclosed simultaneously. In order to assure accuracy, it is necessary for the issuer to monitor all disclosure. It is advisable that one department or individual be responsible for assuring the accuracy of all of the issuer's disclosure.

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2. An issuer should consider what kind of information it wants to make available to investors on its Website and then evaluate how to best monitor the disclosure information.
3. Review of disclosure information on the Website should be undertaken on a regular basis, and in particular when the issuer is preparing to issue debt. Disclosure information should be evaluated at least quarterly, and more frequently if material financial or operating information becomes available or if there are current issues that could affect investors' perception of the issuer's credit.
4. *Additional Considerations:*
  - (a) Financial statements;
  - (b) Press releases;
  - (c) Third party information through hyperlinks.

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